SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 129

MARJORIE FLEMING LLOYD-SMITH,
Petitioner,

vs.

DONALD BICKNELL, RECEIVER OF THE BANK OF SAGINAW, SAGINAW, MICHIGAN.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The opinion of the District Court (R. 23-28) is reported in 29 F. Supp. 929.

The opinion of the Circuit Court of Appeals (R. 37-41) is reported in 109 F. (2d) 527.

The statement of the case appears in the foregoing petition.

Jurisdiction.

The order for mandate of the Circuit Court of Appeals was entered on March 7, 1940 (R. 42). The time to apply for a writ of certiorari, therefore, runs from that date.

The jurisdiction of this Court is invoked under 28 U. S. C. § 347.

Question Involved.

The question presented is whether the new Federal Rules of Civil Procedure should be interpreted as changing the practice established by this court in *Booth* v. *Clark*, 17 How. 322 (1854) and other decisions of not permitting a foreign receiver to maintain a suit in the Federal court and requiring that an ancillary receiver be first appointed.

Specifications of Error.

1. The Circuit Court of Appeals erred in disregarding the prior controlling decisions of this Court.

2. The Circuit Court of Appeals erred in holding that Rule 17(b) of the Federal Rules of Civil Procedure abolishes the long established rule of the Federal courts of not permitting a foreign receiver (who is not vested with title to the cause of action) to maintain suit and requiring that an ancillary receiver be first appointed.

3. The Circuit Court of Appeals erred in holding that Rule 66 of the Federal Rules of Civil Procedure does not preserve the established practice as to a foreign receiver appointed by an administrative officer of a State.

4. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is in conflict with the prior decisions of this Court which for nearly a century have established and upheld the Federal practice of not permitting a foreign receiver to maintain suit, unless

he is a "universal successor" vested with title to the cause of action.

The rights alleged in the complaint were acquired by the Bank of Saginaw, Saginaw, Michigan, in 1927 and the cause of action arose in 1932 (R. 4-5). Respondent Bicknell was appointed in Michigan as receiver for the bank in 1936 (R. 3-4). He did not get title to the assets, and the bank was not dissolved.

In August, 1938, without obtaining an ancillary appointment, he came to New York and commenced the present suit.

Under these facts, the long settled practice in the Federal courts has been to refuse to allow the foreign receiver to sue and to require that there be a duly appointed ancillary receiver subject to the control of the local court. This practice was established by this Court in 1854 by its decision in *Booth* v. *Clark*, 17 How. 322. It has been constantly followed.

Great Western Mining & Manufacturing Company v. *Harris*, 198 U. S. 561 (1905);
Keatley v. *Furey*, 226 U. S. 399 (1912);
Sterrett v. *Second National Bank*, 248 U. S. 73 (1918);
Lion Bonding Company v. *Karatz*, 262 U. S. 77 (1923);
McCandless v. *Furlaud*, 293 U. S. 67 (1934).

The decision of the Circuit Court of Appeals in the present case is in conflict with the above decisions of this Court.

The Federal decisions make no distinction between a receiver appointed under general equity powers and a receiver appointed under statutory provisions.

There is only one exception where this Court has held that an ancillary appointment is not required, and that is where a statute constitutes the receiver the "universal successor" of the corporation, vesting him with title to the assets. In the present case the District Court held that the Michigan statute did not vest the respondent with such title

(R. 26-28), and the Circuit Court of Appeals assumed this to be true, after quoting the relevant statutory language (R. 37-38).

The Federal practice of requiring an ancillary appointment is so firmly settled that this Court stated that it could be changed only by legislation, saying in *Sterrett* v. *Second National Bank,* 248 U. S. 73 (1918):

> "* * * The system established in Booth *v.* Clark has become the settled law of the federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action" (P. 77).

The statement had previously been made by this Court in *Great Western Mining Co.* v. *Harris,* 198 U. S. 561 (1905).

II.

In the adoption of the new Federal Rules of Civil Procedure there was no intent to change the practice established by the decisions of this Court.

The District Court held that under the practice established by this Court the Michigan receiver could not maintain the present suit, and the District Court further held that the new Federal Rules did not effect any change in this matter.

Although *Booth* v. *Clark, supra,* and the other decisions of this Court listed on page 10 above were emphasized in petitioner's brief and oral argument in the Circuit Court of Appeals, the opinion of that court does not even refer to any of those decisions and so far as can be told from the opinion they were not taken into consideration. Instead, the opinion plunges directly into a discussion of Rule 17(b).

On our present question the new Rules should not be read *in vacuo*, but they should be read in the light of the many decisions of this Court covering the very question here involved. We submit that nowhere can any indication be found which shows that the new Rules were intended to change the effect of those decisions.

There are only two Rules which need to be considered. One is Rule 17(b), containing the general provision as to capacity to sue and reading as follows:

> "(b) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

The other is Rule 66, which is the only Rule relating to receivers and which reads as follows:

> "*Rule 66. Receivers.* The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."

Rule 66 cannot have been intended to effect any change, for, by its very terms, it is a simple declaration that the practice as to receivers is not to be changed by the new Rules.

It seems to be equally true that in adopting Rule 17(b) there was no intent to effect any change in the established practice as to matters similar to the present one. We cannot find, either in the notes of the Advisory Committee or in the discussions before the House Judiciary Committee, any suggestion that Rule 17(b) was intended to change the existing law; and there is some affirmative indication that it was not intended to change the existing law. (Hearings Judiciary Committee, House of Representatives, 75th Congress, Third Session, on Rules of Civil Procedure for the District Courts, p. 108.)

In "Moore's Federal Practice Under the New Federal Rules", Vol. II, pp. 2088-91, our specific question is discussed and the authors state that the need for change as to the practice curtailing the extra-territorial powers of receivers was urged upon the Committee but that it is not believed that any change was made. The authors close their discussion of our specific question by quoting Rule 66 and stating:

> "This adopts the well-settled federal rules on primary and ancillary receivers, and the capacity of the chancery receiver as hereinabove discussed, and should prevail over the generality of Rule 17 (b)." (at p. 2091)

III.

The decision of the Circuit Court of Appeals is in conflict with the prior decisions of this Court which show that the curtailment of extra-territorial powers of receivers is not a matter of capacity to sue.

The Circuit Court of Appeals, in holding that the present question was to be governed by Rule 17(b) and not by Rule 66, held that this was a mere question of capacity to sue and was not a matter of receivership administration. In arriving at this result the Circuit Court of Appeals

is in conflict with the decisions of this Court, particularly *McCandless* v. *Furlaud, infra.* Indeed, the court below failed to discuss or even to cite the prior decisions of this Court.

The decisions of this Court clearly show that the requirement that an ancillary receiver be appointed, has always been regarded as a matter of receivership administration. In the case which first established the practice, *Booth* v. *Clark,* 17 How. 322 (1854), this Court stated at p. 338:

> "* * * we think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability."

Again, in *Great Western Mining Co.* v. *Harris,* 198 U. S. 561 (1905), this Court referred to the doctrine of *Booth* v. *Clark* and, after quoting the above language, this Court said:

> "It is doubtless because of the doctrine therein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with a view of vesting control of property rights in the court in whose jurisdiction they are located." (p. 577)

Finally, in its most recent pronouncement with respect to suits by foreign receivers in *McCandless* v. *Furlaud*, 293 U. S. 67 (1934) (where this Court reversed a decision of the Circuit Court of Appeals for the Second Circuit), this Court said:

> "*Great Western Mining Co.* v. *Harris*, 198 U. S. 561, 576, shows that the rule of *Booth* v. *Clark* rests upon practical considerations." (p. 76)

The opinion written by Mr. Justice Brandeis in the *McCandless* case states in so many words that the question raised in our present case is not a matter of capacity to sue. The facts were as follows: McCandless had been appointed receiver in Pennsylvania. He then came into the Federal court in New York and obtained an ancillary appointment. Then, as the ancillary receiver, he brought suit in the United States District Court for the Southern District of New York. He obtained a judgment and the defendant appealed. Upon the appeal, the defendant attempted for the first time to question the regularity of the ancillary appointment. This Court held that, where there had been an ancillary appointment, the validity of such appointment could not be raised for the first time upon appeal. Mr. Justice Brandeis said:

> "But an objection to the plaintiff's legal capacity to sue will not be entertained if taken, for the first time, in the appellate court." (p. 73)
>
> "The alleged invalidity of the order appointing McCandless ancillary receiver is a defect of this character. * * * The objection sustained goes * * * to the legal capacity of the plaintiff as ancillary receiver." (pp. 74-75)

This opinion carefully distinguished the question involved in the *McCandless* case from the situation involved in *Booth* v. *Clark, supra,* as follows:

> "The objection which the Court of Appeals held fatal to the maintenance of this suit differs in essence from that sustained in *Booth* v. *Clark*. There, the foreign equity receiver suing in the federal court of another State failed because, having no title to the assets within the district, he was without a cause of action. He lacked title because the order appointing him did not, and could not, transfer to him the assets involved in the litigation. For that reason, a bill in the federal court for southern New York brought by the primary receiver, alleged to have been duly appointed in Pennsylvania and authorized to bring this suit, would have been bad on demurrer. But this bill by the ancillary receiver, which alleges that he had been duly appointed by the federal court for New York and authorized to bring the suit, would have been good on demurrer" (p. 75).

We submit, therefore, that the *McCandles* case and the other decisions of this Court show clearly that the doctrine of *Booth* v. *Clark* is not a matter of capacity to sue, and that the present matter cannot be governed by Rule 17 (b). That being true, it does not matter whether Rule 66 affirmatively covers it or whether the new Rules are to be regarded as entirely silent upon this matter. The result is the same in either case, that is to say, the long-established Federal practice remained unchanged by the adoption of the new Rules.

It may also be noted that the New York decisions cited in the opinion of the Circuit Court of Appeals in themselves show that a foreign receiver cannot sue as a matter of right. The place where the New York and Federal courts disagree is upon the question whether it is sound practice in receivership administration to permit suit as a matter of comity without ancillary appointment.

IV.

The court below erroneously construed Rule 66 and created a novel and extraordinary distinction between a receiver appointed by a court and a receiver appointed by a State administrative officer.

The court below devoted a goodly portion of its opinion to a discussion of the verbal niceties in Rule 66. In this connection, it might possibly be worth noting that the court's opinion inadvertently fails to quote the language exactly.

Even as a matter of literal construction we will be prepared to argue that the court's interpretation was erroneous. But we don't believe that the application of Rule 66 is to be regarded as an exercise in English rhetoric. Moreover, as we state above, we do not believe it matters whether Rule 66 covers the present question or whether the new Rules are entirely silent.

The necessary effect of the decision of the Circuit Court of Appeals is to create a distinction between two receivers who possess identical powers and neither of whom is vested with title. This distinction arises solely by reason of the appointment of one receiver *ex parte* by a State administrative officer. Such receiver, solely by reason of such appointment and not by reason of any provision of the statute under which he was appointed, would be given greater extra-territorial powers than the decisions of this Court or the opinion below give to a receiver who has received a regular judicial appointment by a court of competent jurisdiction. Any such doctrine or distinction is entirely novel. We are not able to find anything in the prior decisions of this Court to suggest a justification for it. Moreover, it is a rather extraordinary result, that a receiver should be given greater extra-territorial powers merely because he had

an administrative appointment rather than a judicial appointment.

Conclusion.

We hardly need to point out that the administration of receiverships is an important activity of the Federal courts. The practice controlling the present question as to a suit by a foreign receiver was established by the decision of this Court in 1854 and has been followed in many later decisions by this and other courts. The decision below, without citing or discussing those decisions, upsets this established practice and creates a novel distinction between a receiver appointed by administrative action and a receiver appointed by judicial action.

We submit that the decision below will produce uncertainty and confusion and that it should be reviewed by this Court.

The petition for a writ of certiorari should therefore be granted.

Dated, May 31, 1940.

Respectfully submitted,

BOYKIN C. WRIGHT,
Counsel for Petitioner,
63 Wall Street,
New York, New York.

JAMES A. FOWLER, JR.,
W. R. PERDUE, JR.,
Of the New York Bar,
Of Counsel.